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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM SERGIO RODRIGUEZ,

Defendant and Appellant.

H038588

(Santa Clara County

Super. Ct. No. C1110340)

Having previously granted review, the California Supreme Court filed its decision in this case on August 22, 2016. (*People v. Rodriguez* (2016) 1 Cal.5th 676 (*Rodriguez*).) The Supreme Court reversed our decision and remanded the matter to this court with directions to instruct the trial court to determine on the record whether the judge who initially granted defendant Adam Sergio Rodriguez’s motion to suppress (Pen. Code, § 1538.5) is available to hear his relitigated motion to suppress.¹

BACKGROUND

The relevant underlying facts are described in the Supreme Court’s opinion: “On February 24, 2010, the People filed a complaint in Santa Clara County Superior Court charging [Rodriguez] with one count of possession of child pornography (§ 311.11, subd. (a)) and one count of misdemeanor marijuana possession (Health & Saf. Code, § 11357, subd. (c)). On September 1, 2010, Rodriguez moved under section 1538.5[, subdivision] (a) to suppress all evidence seized from his desktop computer, arguing that

¹ Unspecified statutory references are to the Penal Code.

this evidence was obtained after police had entered Rodriguez's home without a warrant or proper consent. Judge Diane Northway, sitting as a magistrate, denied this motion and held Rodriguez to answer.

"Rodriguez filed a renewed suppression motion in superior court on January 3, 2011, pursuant to section 1538.5[, subdivision] (i), which permits a defendant who 'was held to answer at the preliminary hearing' to 'renew or make the motion [to suppress] at a special hearing relating to the validity of the search or seizure.' Judge Vincent Chiarello granted the renewed motion on May 2, 2011, finding that statements made by police outside Rodriguez's home rendered any consent to search the premises involuntary. The suppressed evidence included images and video footage of child pornography obtained from Rodriguez's desktop computer. Also inadmissible was a subsequent search warrant—a fruit of the initial encounter—that resulted in further forensic analysis of Rodriguez's computer, as well as statements he made to police during the execution of that search warrant. The case was dismissed at the People's request.

"The People then filed a new complaint on July 11, 2011, alleging the same offenses. Rodriguez filed a motion to suppress, contending that the 'Proper Venue for This Motion' was before Judge Chiarello pursuant to section 1538.5[, subdivision] (p) because Judge Chiarello was the 'same judge' who had granted Rodriguez's previous motion. In conjunction with his suppression motion, Rodriguez also filed a 'Request For Calendar Setting,' which asked that the motion be assigned to Judge Chiarello.

"The People opposed assignment to Judge Chiarello. In a hearing before Presiding Judge Jerome Nadler, in San Jose, the court denied Rodriguez's request to have Judge Chiarello hear this latest suppression motion. The court explained its decision thus: 'Well, counsel, I don't agree with your interpretation that it needs to go back to Judge Chiarello by law. Furthermore, Judge Chiarello is not available to me any longer; he's been transferred to another division, in Palo Alto.' Judge Nadler continued:

‘And judges are—mine is a limited jurisdiction Court—I hate to say it—and so departments make themselves available when they’re available to me, with the exception of Department 54, who’s Judge Del Pozzo, who’s assigned full time to my division, or to take Preliminary Examination matters. Everyone else volunteers for that assignment on an availability basis. [¶] So I’m not sure who’s going to be available on October 27th at 8:32 when this matter is set for Preliminary examination and now 1538.5. [¶] It will just have to go out to whatever Judge is available on that date.’

“The matter then came before Judge Vanessa Zecher, sitting as a magistrate, for preliminary hearing in San Jose on December 8, 2011. Rodriguez opposed the assignment to Judge Zecher, arguing again that under section 1538.5[, subdivision] (p) Judge Chiarello should hear the motion to suppress. The People disagreed. Judge Zecher sent the parties back to Judge Nadler to argue the matter. After considering the parties’ arguments, Judge Nadler reaffirmed his prior conclusion: ‘Judge Chiarello has a sentencing calendar today in Palo Alto and, therefore, [is] not available for this prelim. [¶] This matter is reassigned to Judge Zecher for prelim right now.’ The parties returned to Judge Zecher, who on December 13, 2011, denied Rodriguez’s motion to suppress and held him to answer on count 1, the child pornography charge. Count 2, for marijuana possession, was dismissed.

“Dissatisfied with these rulings, Rodriguez filed a renewed motion to suppress pursuant to section 1538.5[, subdivision] (i) on February 8, 2012, seeking review in superior court. Rodriguez sought to set aside Judge Zecher’s order holding him to answer and reiterated that Judge Chiarello should have heard the relitigated motion to suppress. This time, the People conceded the motion should have been heard by Judge Chiarello, not Judge Zecher, because ‘Judge Chiarello was available’ even though ‘he had been transferred to another department of the Superior Court.’ But according to the People, the appropriate vehicle for challenging Judge Zecher’s rulings was a section 995

motion. Rodriguez ultimately withdrew his motion after the trial court concluded a renewed motion to suppress under section 1538.5[, subdivision] (i) was not the proper vehicle for setting aside Judge Zecher's holding order.

"Instead, Rodriguez moved on March 6, 2012, to set aside the information under section 995. He argued that because his motion to suppress had been heard by Judge Zecher—and not Judge Chiarello—he had been deprived of a substantial right, for which the proper remedy was to set aside the information. The People opposed the motion, asserting that Rodriguez's decision to bring his motion to suppress in conjunction with the preliminary hearing—rather than waiting to bring the motion until *after* the hearing—removed the situation from the ambit of section 1538.5[, subdivision] (p), which contains no requirement that the same judge preside over any subsequent preliminary hearing. Judge Linda Clark denied Rodriguez's motion on March 28, 2012.

"In so doing, however, Judge Clark invited Rodriguez to file yet another section 1538.5[, subdivision] (i) motion to the extent he wanted review of Judge Zecher's denial of the relitigated motion to suppress. Rodriguez did so. The People opposed the motion to suppress, which Judge Clark denied on April 25, 2012.

"With no more suppression motions to file, Rodriguez waived his right to a jury trial on May 7, 2012. Four days later, Judge Chiarello conducted a bench trial in Palo Alto. He found Rodriguez guilty of the single child pornography charge, suspended imposition of sentence, and placed Rodriguez on three years' felony probation, subject to various terms and conditions.

"The Court of Appeal affirmed. At the outset, the Court of Appeal concluded that section 1538.5[, subdivision] (p) grants the trial court discretion to determine whether a judge is available. The Court of Appeal then concluded that Judge Nadler's 'wholly discretionary' authority, as presiding judge, to assign motions to different superior court judges justified the conclusion that Judge Chiarello was not available because he was in

Palo Alto hearing other matters.” (*Rodriguez, supra*, 1 Cal.5th at pp. 679-682, fn. omitted.)

Rodriguez petitioned the Supreme Court, which granted review.

DISCUSSION

Rodriguez brought a relitigated motion to suppress with the trial court and requested the motion be heard by Judge Chiarello, who had heard and granted the first motion to suppress. Section 1538.5, subdivision (p), requires relitigated motions to suppress be heard by the same judge who granted previous motion if that judge is “available.” The term “available” is not defined in the statute. At issue in Rodriguez’s case is whether Presiding Judge Nadler abused his discretion when he found Judge Chiarello to be unavailable to hear the relitigated motion to suppress, because Judge Chiarello was sitting at the Palo Alto courthouse at the time.

When interpreting section 1538.5, subdivision (p), the Supreme Court first turned to the plain and ordinary definition of the term “available.” (*Rodriguez*, 1 Cal.5th at p. 686.) “According to the Oxford English Dictionary, ‘available’ means, inter alia, ‘capable of being made use of, at one’s disposal, within one’s reach.’ (1 Oxford English Dict. (2d ed. 1989) p. 812.) At the time section 1538.5[, subdivision] (p) was enacted, Black’s defined ‘available’ as follows: ‘Suitable; useable; accessible; obtainable; present or ready for immediate use.’ (Black’s Law Dict. (6th ed. 1990) p. 135, col. 1 (Black’s 6th ed.).)” (*Ibid.*)

The Supreme Court also considered the legislative history of section 1538.5, which was enacted to prohibit prosecutors from engaging in forum shopping or judge shopping. (*Rodriguez, supra*, 1 Cal.5th at p. 690.) Having a relitigated motion to suppress be held before the same judge who granted the first motion ensures that prosecutors will have to present the motion before a judge who is already versed in the relevant facts and familiar with the reason for the original grant. (*Ibid.*) “That judge is in

the best position to weigh whatever new evidence or arguments the People have brought to bear and test those against his or her reasons for granting the previous motion to suppress.” (*Ibid.*) Such an arrangement would protect a defendant’s rights while giving prosecutors the ability to have a second chance to oppose a motion to suppress. (*Ibid.*)

The Supreme Court determined that although a trial court retains the discretion to decide whether a judge is available within the meaning of section 1538.5, subdivision (p), its discretion is not unfettered. A trial court’s discretion “must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion.” (*Rodriguez, supra*, 1 Cal.5th at p. 691.) Accordingly, “mere inconvenience” is insufficient to render a judge unavailable under section 1538.5, subdivision (p). In exercising its discretion, a trial court may consider various factors that may bear on a judge’s availability, including court resources, the interests of the parties, and the interests of other litigants in the case. (*Rodriguez, supra*, at p. 691.) A trial court must take “reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion.” (*Ibid.*) Only if these steps are taken may a judge be found unavailable. A finding of unavailability must be made on the record to facilitate meaningful appellate review. (*Ibid.*)

Here the record does not reflect Judge Nadler attempted to contact Judge Chiarello, or otherwise inquired whether Judge Chiarello was available to hear the renewed motion. Accordingly, Judge Nadler abused his discretion when he denied Rodriguez’s request to have his relitigated motion to suppress be heard by Judge Chiarello. (*Rodriguez, supra*, 1 Cal.5th at pp. 693-695.)

Furthermore, the error was prejudicial. The People do not dispute that the same facts were presented at the relitigated suppression motion hearing. Accordingly, it is reasonably probable that Rodriguez would have received a more favorable outcome had

Judge Chiarello heard the relitigated suppression motion. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Rodriguez, supra*, 1 Cal.5th at p. 695.)

Accordingly, we reverse and remand the matter back to the trial court. On remand, the trial court is directed to determine on the record whether Judge Chiarello is available to hear the motion to suppress. If Judge Chiarello is available, the relitigated motion to suppress must be heard by him.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to determine on the record whether Judge Chiarello is available to hear the relitigated motion to suppress consistent with the standards set forth in *People v. Rodriguez* (2016) 1 Cal.5th 676, 691.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.